Pac. 1139. A section man in the service of an interstate carrier, hurt while repairing a track to scales on which cars destined to other states were weighed, was "engaged in interstate commerce." *Dowell* v. *Wabash R. Co.* (Mo.), 190 S. W. 939. So, also, was a section man engaged in assisting a surveyor working on an interstate track. *Southern R. Co.* v. *McGuin*, 153 C. C. A. 447, 240 Fed. 649.

The following cases seem to be in conflict with the instant decision. A carpenter injured while riveting a stovepipe for a stove in a roundhouse used for interstate engines, was not "engaged in interstate commerce." See *Dunn* v. *Missouri Pac. R. Co.* (Mo.), 190 S. W. 966. An employee injured while building a scaffold from which later he was to paint a freight shed, was not engaged in an act so directly connected with interstate commerce as to form a part thereof, even though the shed was, itself, used in interstate commerce. *Killes* v. *Great Northern R. Co.*, 93 Wash. 316, 161 Pac. 69. Nor was a railroad employee who suffered injury while icing interstate cars. *Southern R. Co.* v. *Pitchford*, 253 Fed. 736. An assistant gardener employed, by a railroad company engaged in interstate commerce, to cultivate the yard about a station and gather trash, is not "engaged in interstate commerce." *Galveston H. & S. A. R. Co.* v. *Chojnacky* (Tex.), 163 S. W. 1011. Nor is a teamster who is employed on construction work in a tunnel to be used, when completed, for interstate commerce, but never yet so used. *Jackson* v. *Chicago, M. & St. P. R. Co.*, 210 Fed. 495. See *Illinois Central R. Co.* v. *Behrens*, 233 U. S. 473, Ann. Cas. 1914C, 163 and exhaustive note.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES "ARISING OUT OF" EMPLOYMENT—DEATH BY LIGHTNING.—The plaintiff's husband was employed by the defendant to rake leaves in a certain park. While he was so engaged, a violent thunder storm arose and he took shelter with a fellow workman under a nearby tree. No other shelter had been provided. While he was thus sheltered, the tree was struck by lightning, and he was instantly killed. This action was brought by the deceased's widow under a Workmen's Compensation Act. *Held*, she was entitled to compensation. *Chiulla de Luca* v. *Board of Park Commissioners* (Conn.), 107 Atl. 611.

It is well settled, both in England and in this country, that, under the usual Workmen's Compensation Act, compensation is recoverable only for injuries received "in the course of" and "arising out of" the employment. *Fitzgerald* v. *Clarke*, [1908] 2 K. B. 796, 1 B. W. C. C. 197; *In re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. The quoted phrases are found in practically every such statute. See *Wiggins* v. *Industrial Acc. Board*, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, Ann. Cas. 1918E, 1164. Hence, to permit a recovery, it is not sufficient that a workmen be injured "in the course of" his employment, but there must be such a causal connection between his employment and the accident that it may be said the injury "arose out of" the employment. The injury from lightning must be a risk reasonably incident to the employment. *Fitzgerald* v. *Clarke, supra.* The situation of the workman must render him more liable than other per-

sons to be struck by lightning. Whether the situation is such that the risk is greater than ordinary, is generally a question of fact concerning which there may be differences of opinion. *Hoenig* v. *Industrial Commission,* 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339. Where expert witnesses testified that the position of a workman on a scaffold twenty-three feet from the ground involved a risk greater than ordinary, a finding that his death "arose out of" his employment was sustained. *Andrew* v. *Failsworth Industrial Society,* [1904] 2 K. B. 32, 90 L. T. N. S. 611, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429. But where a workman engaged in keeping the outlets and gulleys of a street clear, in order to prevent the street from being flooded, was struck by lightning, the Irish Court of Appeal held that the accident did not "arise out of and in the course of the employment." *Kelly* v. *Kerry County Council* (1908), 42 Ir. Law Times 23, 1 B. W. C. C. 194. See L. R. A. 1916A, 44, note 79. This case was distinguished from the English case above in that the decedent was exposed to no special or peculiar danger from lightning, and hence did not come within the Compensation Act. These two are the leading cases on the subject.

No true test as to whether a lightning stroke is an injury "arising out of and in the course of" the employment has been evolved by the American courts. The general tests established by the British cases have been adopted in principle, but the application of them to specific facts has not been harmonious; much has depended upon the spirit in which the particular court has interpreted the act. Where the deceased was struck by lightning while engaged in working on a dam, the industrial commission found that his position was not peculiarly dangerous and denied compensation. This finding was upheld on appeal. *Hoenig* v. *Industrial Commission, supra.* The appellate court, however, quoted the lower court as stating that if the case were presented to it for a finding from the evidence, it would not make the same finding. In Michigan the act is strictly construed, as being in derogation of the common law. *Andrejwski* v. *Wolverine Coal Co.,* 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724. Where the decedent, a member of a railroad section gang, at the direction of his foreman sought refuge in a nearby barn during a thunder storm, and, while there, was killed by lightning, it was held that the injury did not "arise out of and in the course of" the employment. *Klawinski* v. *Lake Shore R. Co.,* 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342. This decision seems to be in direct conflict with the holding in the instant case. The Minnesota court, on the other hand, has held the act remedial and, therefore, entitled to a liberal construction. *Virginia & Rainy Lake Co.* v. *District Court,* 128 Minn. 43, 150 N. W. 211. Where the decedent, a driver of an ice wagon, while following his usual route, left his wagon and went towards a tall tree, either for protection or on his way to solicit orders, and both he and the tree were struck by lightning, compensation was allowed. *People's Coal and Ice Co.* v. *District Court,* 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344. It is difficult to reconcile this case with the Michigan cases.

Many courts refuse compensation where the facts do not clearly in-

dicate any extra or peculiar danger from lightning. *Griffith* v. *Cole* (Iowa), 165 N. W. 577, L. R. A. 1918F, 923; *Wiggins* v. *Indusrtial Acc. Board, supra.* Where the decedent was struck by lightning while in a boarding tent provided by his employers, erecters of steel bridges, and the tent, situated on wet ground in a river bottom, lacked lightning arresters and was higher than surrounding objects and near a wire fence and a pile of steel rods, compensation was refused under the Iowa Act. *Griffith* v. *Cole, supra.* The same facts, it is entirely probable, would give rise to opposite decisions in different jurisdictions.

In Virginia, it was held that where the master did not protect by proper lightning arresters his servant engaged in interstate commerce, whose duty it was to use a telephone, and the servant was injured by an excessive electric charge, due to lightning coming in contact with the telephone wires, the master was liable for damages under the Federal Employers' Liability Act. *Atlantic Coast Line R. Co.* v. *Newton*, 118 Va. 222, 87 S. E. 618. But the court, it is to be noted, based its decision upon the negligence of the employer.

For a further discussion of what are accidents "arising out of and in the course of" employment, see 3 VA. LAW REV. 232.